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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 592

CHARLES H. GRIFFITHS, TRUSTEE IN REORGANIZATION OF GENERAL STORES CORPORATION,
Petitioner,

vs.

LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954,
Respondent.

On Petition For A Cross Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT, LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954, IN OPPOSITION

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OPINION BELOW

Petitioner is attempting to review a part of the judgment of the United States Court of Appeals entered on August 26, 1959, reversing a part of the judgment of the United States District Court for the Southern District New York refusing to allow Respondent interest on fully secured notes of the Debtor at the contract 6% rate after the date of their accelerated maturity. The opinion of the Court of Appeals is reported at 269 F.2d 827.

JURISDICTION

Petitioner is seeking a review out of time.

The time for Petitioner to file his petition expired November 24, 1959. No petitions for rehearing were filed within the time (15 days) allowed by the rules of the Court of Appeals or during the ninety-day period following the entry of its judgment on August 26, 1959.

Petitioner's reference to his motion in the Court below to file a petition for rehearing out of time is *dehors* the record. The motion was filed December 1, 1959, and the Court below denied it on December 11, 1959. This did not revive Petitioner's lost right. *Morse* v. *U.S.*, 270 U.S. 151, 154; *Federal Trade Commission* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206.

Petitioner seeks to invoke the jurisdiction of the Court out of time because of an extension granted Respondent. On November 26, 1959, Mr. Justice Harlan (in No. 369) granted Respondent an extension, on Respondent's timely application therefor, to file Respondent's petition to review an unrelated and separate part of the judgment of the Court below which affirmed a part of the judgment of the United States District Court with respect to Respondent's claim for compensation and expenses.

ARGUMENT ON JURISDICTION

Petitioner cites no authority and gives no reasons for his assertion that an extension to Respondent to seek relief here from a ruling below adverse to Respondent automatically extends Petitioner's time to seek relief here from a ruling below adverse to Petitioner.

Petitioner's right to complain here of an adverse ruling of the Court below is dependent upon his own appli-

cation for review. A party who fails to apply for a review cannot here seek relief from any adverse ruling of the Court below in a proceeding here by another party involving the same judgment. *Hubbard* v. *Tod*, 171 U.S. 474, 495; *Bolles* v. *Outing Company*, 175 U.S. 262, 268 and cases cited; *Warner* v. *Independent Pier Co.*, 278 U.S. 85; *Alexander* v. *Cosden Co.*, 290 U.S. 484, 487; *Morley* v. *Maryland Casualty Co.*, 300 U.S. 185. In *Alexander* v. *Cosden*, *supra*, this Court said:

> "The defendant alone petitioned for review here. In this situation the plaintiff is not entitled to be heard in opposition to the parts of the decision of the Court of Appeals which were adverse to it—as were the rejection of the third claim and the reduction of the award on the fourth—but only in support of the parts which were in its favor. As to the former it has acquiesced and become concluded by not *seasonably petitioning for a review*. (Citing cases.)" (Emphasis supplied)

As Petitioner seeks a review of rulings of the Court below adverse to him, he should have filed his petition seasonably. "It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period." *Federal Trade Comm.* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 213; *Boylan* v. *U.S.*, 257 U.S. 614.

A cross appeal out of time must be dismissed, although the record then be before this Court on a timely appeal. *Farrar* v. *Churchill*, 135 U.S. 609, 612-13.

The extension granted Respondent affords no shelter to Petitioner. The order of Mr. Justice Harlan granted additional time in the cause of *Lewis J. Ruskin, Trustee*

Petitioner v. *Charles H. Griffiths, Trustee,* docketed as No. 569, for the filing of the petition for writ of certiorari, and hence by its terms granted additional time only to Respondent.

The rules of this Court (Rule 34, paragraphs 2, 3 and 4) establish that the extension of time is to the applicant alone. In each paragraph reference is to an extension of the "time within which *a party* may petition for a writ of certiorari" (Emphasis supplied). Paragraph 4 makes it "the duty of the *party* to whom *such extension is granted* to give all *other* parties to the proceeding prompt notice thereof" (Emphasis supplied). By paragraph 2 the application is deemed timely "if presented to the clerk within the period sought to be extended".

The Petitioner had requested no extension, and the time therefor, as well as for the petition, had elapsed.

The statute (28 U.S.C. §2101(c)) requires a showing of good cause for an extension of time in which to apply for a writ of certiorari. Petitioner shows none.

The good cause set out in Respondent's application cannot be extended to Petitioner. Respondent's application showed that Petitioner had applied to the Court below for an order recalling its mandate; that Petitioner there represented he would apply to this Court for a writ of certiorari; that Respondent thereupon went forward and prepared his petition for a cross-writ to be docketed upon the record to be filed by Petitioner; that Respondent's petition was printed and ready for filing in the office of the Clerk of this Court on the due date; that when Petitioner failed to present a timely petition, Respondent had no alternative but to apply on the due date for an extension of time in which to file a record and docket his petition.

Petitioner's neglect, to the surprise of Respondent's counsel, constituted good cause for an extension of time for Respondent per the order of Mr. Justice Harlan. But Petitioner's own neglect cannot constitute "good cause" for additional time to Petitioner.

By sleeping on his right to apply for timely relief from this Court, Petitioner has abandoned his right for Supreme Court review.

CONCLUSION

The petition for certiorari should be dismissed.

QUESTION PRESENTED

Whether the Court of Appeals was warranted in concluding under the facts and circumstances of this case, that equitable principles require payment to secured creditors of simple interest at the contract rate on overdue principal where the maturity was found by the District Court to have been validly accelerated before the amended petition under Chapter X was filed, the subsidiary companies, whose stock was held as security, earned $1,472,000.00 during the entire period (many times the interest requirement for the period), the notes and interest were fully secured, there was no unjust delay by the secured creditors and a plan of reorganization (confirmed under Section 216(7) without the consent of the secured creditors and in which existing shareholders participate) provides for payment of the secured creditors in full in cash and the surrender of their security to the reorganized debtor.

STATEMENT

On May 19, 1954, the Debtor, General Stores Corporation, purchased all of the outstanding stock in Ford Hopkins Company ("Ford") operating from Chicago, Illinois, a chain of some fifty retail drug stores in Illinois, Indiana, Iowa and Wisconsin. To secure the payment of the balance of the purchase price owing to Lewis J. Ruskin and Rexall Drug Company, evidenced by Debtor's two notes to their orders respectively, the Debtor, pursuant to a Collateral Agreement made with Lewis J. Ruskin, as Collateral Trustee, and dated May 19, 1954, transferred to Lewis J. Ruskin, as Trustee (Respondent), with full and immediate voting rights, all the stock in Ford and also in Stineway Drug Company ("Stineway") which operated a chain of retail drug stores in Chicago.

On October 18, 1954, the Debtor filed its petition in the United States District Court for the Southern District of New York under Chapter XI of the Bankruptcy Act for an arrangement with its unsecured creditors, and was continued in possession.

The notes and Collateral Agreement provided for interest after date at 4% per annum until maturity and 6% per annum on all overdue principal (R. 2a, 8a, 23a). The notes and Collateral Agreement provided that, among other events of default, the filing by Debtor of a petition for an arrangement under the Bankruptcy Act would constitute an event of default and entitle the Respondent or the noteholders to declare the notes immediately due and payable (R. 6a, 12a, 23a). This they did on August 17, 1955. The District Court found that the said notes by said declaration became due and payable on August 17, 1955, and that there had been no waiver of

or estoppel against the default or acceleration (R. 307a), saying: "I have concluded that the principal of the notes was validly accelerated and became overdue on August 17, 1955."

This occurred more than eight months prior to the Debtor's filing (on April 30, 1956) of its amended petition for reorganization under Chapter X of the Bankruptcy Act, and at a time when the District Court had no jurisdiction over secured creditors (except only to stay a foreclosure of security for cause shown, 11 U.S.C. § 714).

After the maturity of the secured debt had been accelerated, Debtor requested Respondent not to foreclose, stating it was negotiating various merger possibilities with a view to payment of the secured notes (R. 82) and later advised that one Richard Goodman was interested and had the money to pay the notes (R. 83). Goodman, the underwriter of the confirmed reorganization plan, began in November, 1955, his purchases of stock in the Debtor and, later, of claims of its unsecured creditors. Prior to that time Goodman had no interest in the Debtor.

On April 30, 1956, the Debtor filed its amended petition under Chapter X, which was approved May 1, 1956, and pursuant to which Petitioner, Charles H. Griffiths, was appointed its Trustee.

During the entire period of the pendency of the Chapter XI and Chapter X proceedings, Respondent was alone in control of and operated the two subsidiaries. Neither the Debtor in possession nor the Reorganization Trustee had or exercised control. The earned income of Ford and Stineway during the entire period exceeded $1,372,000.00, many times the 6% interest requirement for the entire period (Pet. 7, 8). The intimation in

the Petition (Pet. 16) that Respondent should have declared dividends aggregating $500,000 is contrary to the finding of the District Court that: "To have withdrawn these funds from the subsidiaries might have imperiled their financial position to the detriment of all concerned" (Pet. 38).

Extended hearings were held upon a plan of reorganization, unanimously objected to by the secured creditors, seeking to provide only part payment of the secured debt, an extension of the maturity of the balance payable in seven annual instalments with 4% interest annually, the transfer of control of the pledged collateral to the Debtor (of whom Goodman would then be in control), a compulsory dividend by Ford and Stineway to pay a portion of the funds required under the proposed plan and the recovery of $112,696.08 allegedly due from Respondent. Late in November, 1957, the plan was amended to provide for payment of the secured creditors in full in cash with 4% interest and the additional 2% interest as may be finally determined by the courts, an extension of the time of payment of unsecured indebtedness with 3% annual interest, and shareholder participation at the rate of three shares exchanged for one in the reorganized Debtor. The debtor was solvent and the pledged stock in Ford and Stineway constituted its principal assets.

The District Court directed that the consent of the secured creditors was not required (under Section 216(7)) and in due course the plan was confirmed (R. 333a) without their consent.

Ruskin, following approval of the amended plan, petitioned the District Court to determine the amount of his lien upon the collateral for the debt, interest, compensa-

tion for his services and reimbursement for his expenses, including his attorneys' fees. The District Court's order of June 12, 1958 (R. 315a, 340a) refused to allow interest at the 6% rate after August 17, 1955, as provided for in the notes and the Collateral Agreement, and adjudicated the amount of the debt and the interest thereon at 4%. On Respondent's appeal from said order, the Court of Appeals reversed it with respect to the interest rate and allowed it at 6% per annum after August 17, 1955.

The Court of Appeals held that equitable considerations of the case do not deprive Respondent of the benefit of his variable interest contract, that the variable interest provision is a lawful, useful and equitable business practice, that the Debtor was solvent, and had filed its petition under Chapter XI because it believed it beneficial to itself to do so, and concluded:

> "in a case such as this, where there is no showing that the creditor entitled to increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act."

REASONS FOR DENYING THE WRIT

Petitioner asks this Court to review the judgment of the Court below on interest without showing that any of the accepted grounds for granting certiorari is present here. It is submitted that the decision below on interest is correct, presents essentially a factual question, and is not in conflict with any decision of this Court or with any other appellate decision. Petitioner would have this Court expend its limited time in resolving questions which are abstract and irrelevant to the case.

I.

A contract provision that a voluntary bankruptcy proceeding is an event of default is not against public policy.

A filing under Chapter XI of the Bankruptcy Act gives the Court the same jurisdiction, powers and duties as in a bankruptcy proceeding upon adjudication (11 U.S.C. §712). To like effect is an approval of a petition under Chapter X (11 U.S.C. §514).

In *Central Trust Co. v. Chicago Auditorium Association*, 240 U.S. 581, this Court held that an adjudication in bankruptcy, despite the silence of a contract on the subject, would constitute a material anticipatory breach of the contract, although not then otherwise in default, and would permit of proving all damages consequent on such breach. This Court stated:

> "Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement" (240 U.S. 581 at 591).

Since bankruptcy is by operation of law an anticipatory breach, there can be no public policy to prevent the parties from expressly contracting that it shall constitute a default and making provision for such event. *Irving Trust Co. v. A. W. Perry, Inc.*, 293 U.S. 307, aff. 69 F. (2d) 90; *Wm. Filene's Sons Co. v. Weed*, 245 U.S. 593.

It is obvious that the contract with the Debtor did not prohibit it from resorting to bankruptcy proceedings of any kind. But the effect of a bankruptcy proceeding, when resorted to, as an anticipatory breach and a default, is properly the subject of a contract between the parties and not violative of public policy.

II.

The decision of the Court of Appeals does not present the question posed by Petitioner of the extent of the reorganization court's equitable powers with respect to interest.

The Court of Appeals did apply correctly the rule of law recognized by the District Court, namely, that equitable principles governed. The Court below differed with the District Court with respect to where the equity lay in the instant case.

The Court of Appeals exercised its discretion in determining what is or is not equitable. It took into account the following salient equitable considerations: There is nothing inequitable in the variable interest contract in the case at bar. It is a useful and equitable business practice to the advantage of the borrower. The Debtor had expressly agreed that the result of its filing a Chapter XI petition, would, on acceleration, bring the 6% rate into effect. The Debtor was solvent and hence the usual equitable consideration in bankruptcy of not accruing interest after the filing of the petition would not apply. There was no showing that Respondent caused any unjust delay in the proceeding. The Debtor filed its Chapter XI petition to serve its own interests. It would be the contrary of equity here to allow Debtor to escape from the expressly-bargained-for result of its act.

In reversing the District Court, the Court of Appeals correctly gave no consideration to the untenable views of the District Court on the subject of where the equity lay. The grounds on which the District Court acted presented no equity, as is clear from a brief reference to them.

Four grounds were asserted by the District Court. The first, that Respondent "may" have been "at least partially responsible" for the protracted length of the proceedings, determined neither that Respondent was so responsible nor that his action was improper. The Court of Appeals held there was no showing that Respondent caused any unjust delay.

The second reason, that Respondent's security was ample, is no equitable ground for denying Respondent his rights under his contract, particularly where the pledged stock and the subsidiaries they controlled were never under the management or control of the District Court or Petitioner, and earned $1,472,000 in the period involved—an equitable consideration in Respondent's favor. *Sexton v. Dreyfus*, 219 U.S. 339, 346.

The third reason was that Respondent would be paid some years before the loan would have matured by lapse of time. But this is only the natural consequence of a valid acceleration. Moreover, this Court in *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 127, held that the fact secured notes would not have matured for many years in the future but for the filing of a reorganization petition was no consideration for stockholders' participation in the security under a plan of reorganization. To give it such consideration, this Court held was a denial of the secured creditors' absolute priority.

The fourth reason was an alleged inflation of the reorganized Debtor's capital structure. The District Court itself rebutted this reason in pointing out that under the Amended Plan of Reorganization of Debtor the additional funds required to pay Respondent's claim for the interest at 6%, would be advanced by Goodman, who would receive therefor additional shares of stock in the reorganized Debtor. Under such circumstances the assets of the reorganized Debtor are not depleted, and the only effect is to reduce, to the extent of the advance, the participation of existing stockholders in the pledged collateral. Goodman receives stock at a bargain price for his advance, and the inequity, if any, is in the Plan proposed by Petitioner and underwritten by Goodman, and not in the receipt by Respondent of the contract interest.

The foregoing reasons of the District Court are not equitable considerations to override those found by the Court of Appeals. In rejecting them and itself determining on the record where the equity lay, the Court of Appeals gave full effect to the equitable considerations applicable to the case at bar. The Court of Appeals did not, as asserted by Petitioner, limit the reorganization Court's equitable powers with respect to interest.

III.

The assertion by Petitioner that Debtor was insolvent at the time it filed its Chapter XI petition is not raised in or supported by the record.

Petitioner seeks to inject here, without foundation and gratuitously, a doubt with respect to Debtor's solvency when it filed its Chapter XI petition. This issue of Debtor's solvency or insolvency as at October 18, 1954 was never raised in the record.

Petitioner's alleged record support for its newly-raised point is misplaced. Trustee's Exhibit 6 and the testimony referred to by Petitioner (Pet. p. 6) showed the financial condition of Debtor as at May 11, 1957, not October 18, 1954. Petitioner does not deny, and on the contrary asserts, that Debtor was solvent in 1957.

This obviously does not show insolvency in October, 1954. Reference to Debtor's financial distress in 1954 is no proof of Debtor's insolvency. Actually, Debtor in its Chapter XI petition averred only that it was unable to pay its debts as they matured, not that it was insolvent, and listed its assets at about $5,000,000 and its liabilities at about $4,000,000. *In re General Stores Corporation*, 129 F. Supp. 801, 803; *General Stores Corporation v. Shlensky*, 222 F. 2d 234, 235.

IV.

The decision of the Court of Appeals does not conflict with any decision of this Court.

In *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 (1946), this Court denied recovery of interest on interest to secured creditors in a contest between them and unsecured creditors; the debtor there being insolvent. This Court took jurisdiction not because the judgment of the Court of Appeals was erroneous, since it was affirmed on certiorari granted, but because in that case the Court of Appeals and the District Court, while disagreeing as to the applicable local law, had agreed that the case was to be determined solely by local law. This Court justified the disallowance of interest on interest in Vanston on the basis of equitable principles. This Court stated that equitable considerations, not local law, would govern the allowance of interest in the administration of bankruptcy estates in the Federal Courts.

In the case at bar the Court of Appeals did apply the correct rule of law, namely that equitable principles would govern. It decided the case on the basis that the equity lay with Respondent.

The Court of Appeals distinguished the difference in result from Vanston, not on the grounds that equitable considerations do not apply where the debtor is solvent, but that the bankruptcy equitable principle of ceasing to accrue interest on the debtor's obligations at the beginning of the proceedings does not apply where the debtor is solvent. The Court of Appeals stated (Pet. 68) that this Court itself "carefully noted that this rule with respect to simple interest did not apply where the contest was between a creditor and stockholder of the debtor:

> 'But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor.' 329 U.S. at 164."

Since the Court of Appeals decided the interest question on the basis of equitable principles, and not local law, this Court is not asked to establish any new principle of law nor to correct any failure of the Court of Appeals to apply a correct rule of law. This Court is asked merely to review the discretion exercised by the Court of Appeals on the facts and circumstances of the case at bar in deciding what is or is not equitable.

V.

The petition presents no conflicts between the circuits.

Petitioner does not suggest that there is a conflict between the decision in the case at bar and a decision of another circuit.

However, he quotes extensively from *United States Trust Company of New York* v. *Zelle*, 191 F. 2d 822 (8 Cir. 1951) where the Court continued the pre-maturity rate after maturity. There the mortgage provided for the payment of interest at 4% per annum until the maturity of the bonds, but was silent on the rate of interest after maturity. The Court stated that the terms of the mortgage "by fair implication called for the payment of interest at 4% after maturity." The decision implies that, had the contract expressly provided a post-maturity rate of interest, the Court would have enforced it. The Court stated pp. 825-826:

> "And we conclude that the circumstances amply justify the conclusion of the trial court that *in the absence of a definite provision in the bonds fixing the rate of interest after maturity*, the preferred status of these secured bondholders entitle them on equitable principles to interest during the remaining period of bankruptcy at 4 per cent . . ." (Emphasis supplied.)

It is clear there is no conflict to be settled by this Court.

VI.

The petition seeks review of abstract and irrelevant questions.

The amended Plan of Reorganization of Debtor, as confirmed, provides (Article 4-D(2)) for the payment in full to Respondent as representative of the secured creditors of principal, plus interest at the rate of 4% per annum from May 19, 1954, "plus such other sum, if any, which the courts may finally determine to be payable on the secured creditors' claim for an additional 2% interest from August 17, 1955 . . .".

The order approving the plan provided that the secured creditors

"are not affected by the plan as their claims will be paid in full in cash, hence their acceptance of the plan is not required."

The Debtor (whose stockholders participate under the Plan) has taken advantage of the provision of Section 216 (7) (11 U.S.C. § 616 (7)) of the Bankruptcy Act, to reorganize without the consent of the entire class of secured creditors having a lien on the collateral pledged to Respondent. The provisions of the confirmed plan are, in effect, those of a redemption in equity of the collateral. Thus the Debtor is on its part obliged to do equity. Equitable considerations do not permit a reduction of a solvent debtor's legal obligation on its own redemption.

The determination by the Court below on interest turns on the particular facts of the case at bar. As the Court stated (Pet. 71):

"in a case such as this . . . it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act".

Questions posed by Petitioner derive from cases of distribution of assets by a court administering an estate, and are here abstract and irrelevant.

CONCLUSION

The petition for a cross-writ of certiorari should be denied.

Respectfully submitted,

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Chicago, Illinois
January 8, 1960